



April 1, 2022

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Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

RE: File No. S7-21-21: Share Repurchase Disclosure Modernization

Dear Ms. Countryman:

On behalf of the North American Securities Administrators Association, Inc. (“NASAA”),¹ I am writing in response to U.S. Securities and Exchange Commission (the “SEC” or “Commission”) Release No. 34-93783, *Share Repurchase Disclosure Modernization* (the “Proposal”),² in which the SEC proposes to amend the disclosure standards for share repurchases by issuers and their affiliated purchasers.

The Proposal is intended to “improve the quality, relevance, and timeliness of information related to issuer share repurchases” and reduce information asymmetries in this regard between issuers and investors.³ It would do so by requiring issuers to furnish information on the proposed Form SR one day after the issuer or any of its affiliated purchasers executes an order to buy the issuer’s exchange-listed securities registered pursuant to Section 12(b) of the Securities Exchange Act of 1934 (the “Exchange Act”) or unlisted securities registered pursuant to Exchange Act

¹ Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA’s membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

² The Proposal is available at <https://www.sec.gov/rules/proposed/2021/34-93783.pdf>.

³ Proposal at 4, 10.

Section 12(g).⁴ The Proposal would also make conforming revisions to Item 703 of Regulation S-K, which currently requires issuers to disclose limited share repurchase information in their quarterly SEC reports.⁵ The term “affiliated purchaser” in the Proposal would have the same meaning as is currently used in Item 703,⁶ and issuers would be required to report repurchases executed in the open market or in private transactions.⁷ Notably, the Proposal makes clear that Form SR would be *furnished*, not *filed*, and consequently that erroneous disclosures would not open the door to private securities claims under Exchange Act Section 18 or Section 11 of the Securities Act of 1933 (the “Securities Act”).⁸ Enforcing the Proposal thus would be reserved to the SEC. Finally, the Proposal would mandate that these Form SR and Item 703 disclosures be made using a machine-readable structured data language, Inline XBRL.⁹

NASAA supports the Proposal and encourages its adoption with certain revisions as outlined below. We agree with the Proposal that Form SR would provide a useful informational tool for investors. We agree that furnishing, not filing, is the appropriate submission standard and that no *de minimis* exception is necessary. We disagree slightly, though, with the proposed methodology for submitting Form SR. We believe that Form SR reporting should be required one day after trade settlement, not one day after trade execution. If the Commission chooses execution, though, we encourage the Commission to adopt a precise, bright-line rule for when an amended Form SR is required – we suggest a “five percent misstatement test” below – rather than the more open-ended “materiality” standard contained in the Proposal.

I. Responses to Questions Raised in the Proposal

A. Response to Questions 1, 12 and 25: Issuers Should be Required to Furnish Form SR Daily via Inline XBRL.¹⁰

We believe the Proposal strikes an appropriate regulatory balance where it calls for daily reporting of share repurchases. Issuers should be required to report share repurchases more

⁴ See *id.* at 11-18. The securities of most registered investment companies are excluded from the Proposal, though. *Id.* at 11 n.22.

⁵ See *id.* at 22-24.

⁶ See 17 C.F.R. § 240.10b-18(a)(3).

⁷ Proposal at 5.

⁸ *Id.* at 17-18.

⁹ See *id.* at 29.

¹⁰ *Id.* at 18, Question 1 (“Should we adopt new Form SR to require daily repurchase disclosure, as proposed? Would less frequent disclosure of daily share repurchases (e.g., weekly, monthly, or quarterly disclosure) provide sufficiently timely information about issuer repurchases? . . .”); 21, Question 12 (“Should we require that Form SR be furnished, as proposed? Alternatively, should we require the form to be filed? . . .”); and 31, Question 25 (“Should we require issuers to [report using] Inline XBRL, as proposed? . . .”).

frequently than they currently do. Item 703, adopted by the Commission almost twenty years ago, requires issuers to report share buyback information only quarterly (through Forms 10-Q and 10-K).¹¹ When it adopted Item 703, the Commission considered requiring more frequent disclosures, but declined to do so.¹² That was an oversight the Commission should address now.

The SEC adopted Item 703 with the goal of establishing uniform, comprehensive and timely market disclosures of issuer share repurchase information.¹³ But Item 703 has fallen short of this goal. Item 703 disclosures are not sufficiently comprehensive or timely. Item 703 requires only the most basic information; namely, the total number of shares repurchased during the reporting period, the average price per share, whether repurchases were part of a repurchase plan, and whether shares remain to be repurchased under a repurchase plan. While these are valuable metrics, they do not provide a comprehensive overview of an issuer's repurchase activities or intentions. Furthermore, quarterly reporting is not of great utility for investors. The usefulness of the information for trading decisions likely has passed long before the issuer is required to file the report.

The Proposal would remediate these shortcomings through the proposed Form SR. First, a Form SR would be required after every day on which an issuer or its affiliated purchasers executes a share repurchase. This would make Form SR far timelier than Item 703. Second, Form SR would broaden the scope of repurchase disclosures. Issuers would have to report not only the total number of shares repurchased and the average purchase price, but also: (i) the number of shares purchased in the open market (as opposed to private transactions); (ii) the number of shares purchased in reliance on the Rule 10b-18 safe harbor; and (iii) the number of shares purchased pursuant to Rule 10b5-1 plans.¹⁴ The Proposal would make similar changes to Item 703 to expand the scope of quarterly disclosures.¹⁵ These new metrics would provide a far more comprehensive look into an issuer's repurchase activities and initiatives than is currently required.

We furthermore agree that furnishing, not filing, should be the standard for Form SR. Policing Form SR should be reserved to the SEC. If issuers fail to comply with these new reporting requirements, the SEC has adequate enforcement tools to ensure compliance. But issuers should not have to worry that inadvertently submitting incorrect data on a Form SR will automatically

¹¹ See Final Rule, *Purchases of Certain Equity Securities by the Issuer and Others*, SEC Rel. No. 33-8335 (Nov. 10, 2003) (“Item 703 Final Rule”), available at <https://www.sec.gov/rules/final/33-8335.htm>.

¹² See Proposed Rule, *Rule 10b-18 and Purchases of Certain Equity Securities by the Issuer and Others*, SEC Rel. No. 33-8160 (Dec. 10, 2002) (“Item 703 Proposed Rule”) (“*Q. Is our proposal to require disclosure on a quarterly basis sufficient, or would more frequent disclosure (e.g., monthly or on a ‘real time’ basis) be more meaningful to investors? . . .*”), available at <https://www.sec.gov/rules/proposed/33-8160.htm>.

¹³ See Item 703 Final Rule (“This system should benefit investors and other market participants by providing repurchasing information in a consistent format and in a timely manner.”).

¹⁴ Proposal at 12.

¹⁵ See *id.* at 22-23.

open the door to a private lawsuit, particularly a claim under Securities Act Section 11 where issuers are held strictly liable.¹⁶ Investors would justifiably want a remedy related to an incorrect Form SR if misrepresentations or omissions on the form somehow played a role in an issuer's scheme to manipulate the market for the issuer's securities. But in any such situation, investors would have readily available rights and remedies through the general antifraud provisions of federal and state securities laws.

Finally, we agree that the data on new Form SR should be submitted to the SEC via Inline XBRL. The SEC has mandated Inline XBRL for the filing of certain issuer financial information for several years.¹⁷ Requiring Form SR to be submitted similarly would pose no substantial burden on issuers. In contrast, the potential investor benefits of using Inline XBRL would be extensive because the data would be far easier to download, compile and use.

B. Response to Question 4: Settlement is the Appropriate Time to Furnish Form SR.¹⁸

The Proposal would have issuers furnish Form SR one day after trade execution. The Proposal inquires, though, whether settlement would be a better trigger. We believe it would be.

Form SR should be a report of shares that are actually repurchased – *i.e.*, paid for and received by the issuer and its affiliated persons. This can only be known with certainty at settlement. Form SR should not be a report of repurchase *attempts*, which is what the data would necessarily represent if Form SR were reported after trade execution. Most executed trades will settle, but some will not (such as because of a seller's failure to deliver). If an issuer determined that a Form SR report included failed executions and this error was material, the Proposal would require the issuer to submit an amended Form SR to correct the mistake. But if the error was immaterial, the Proposal would let the errant Form SR data stand.¹⁹ Neither of these alternatives is optimal. It seems a far better approach to us to simply require Form SR at settlement, thereby precluding the potential for failed executions to adulterate the data. The one or two day delay in reporting Form SR while the securities settlement process is completed is not sufficient reason to forego settlement as the trigger. This short timing delay would not be material in the overall framework of an issuer's cumulative Form SR reports.

¹⁶ See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (“Liability against the issuer [under Section 11 of the Securities Act] is virtually absolute, even for innocent misstatements.”).

¹⁷ Proposal at 29-30.

¹⁸ *Id.* at 19, Question 4 (“Should we require disclosure of executed share repurchase orders on Form SR, as proposed? Are there concerns that executed orders may fail to settle . . .?”).

¹⁹ See *id.* at 17 and 18, Question 7.

C. **Response to Question 7: If the Commission Chooses Execution as the Trigger for Form SR, Issuers Should Be Required to Furnish an Amendment to Correct Reporting Errors of 5% or More.**²⁰

If the Commission nonetheless chooses to trigger Form SR reporting at trade execution, the question of what to do about erroneous Form SR reports necessarily arises.²¹ The Proposal would require issuers to furnish an amended Form SR if an initial report contained a “material error.” The Commission’s guidance is as follows: “If there are material errors in, or material changes to, the information [on a Form SR], furnish an amended Form SR.”²² It is unclear exactly what magnitude of error the Commission has in mind. Issuers would thus have to determine for themselves on a case-by-case basis whether a particular error required correction, resulting in varied reporting standards for amended Forms SR across the marketplace.²³

Rather than setting a general legal standard of materiality here, the SEC should instead set a precise numerical threshold for issuers to follow. We recommend the SEC revise the Proposal to set a “five percent misstatement test” for when an amended Form SR would be required – *i.e.*, an issuer would be required to submit an amended Form SR only if the issuer later learned that any of the numerical data on a Form SR was misstated by five percent (5%) or more.²⁴ This would set a clear, easily calculable test for issuers to apply. A five percent threshold also would be similar to the approach taken by the Commission for beneficial ownership reporting under Rule 13d-1(a)²⁵

²⁰ *Id.* at 20, Question 7 (“Should we require issuers to furnish an amended Form SR to correct material changes to transactions previously reported on Form SR, as proposed? Alternatively, should we require all corrections to be made on an amended Form SR, regardless of materiality?”).

²¹ If the Commission follows our recommendation and chooses to trigger Form SR at settlement, the discussion in this section can be set aside. We do not recommend a five percent misstatement test if Forms SR are reported after trade settlement; to the contrary, an amended Form SR should always be required to correct an error reported at trade settlement (as these situations simply should not arise if an issuer has implemented an effective Form SR reporting system).

²² *Id.* at 93.

²³ We suspect many issuers, out of an abundance of caution, would simply submit an amended Form SR to correct any mistake in their data, however small. After all, issuers would face no potential liability for correcting an immaterial error but failing to correct a mistake the SEC later considered to be material would open the door to an enforcement action.

²⁴ Under our proposal, the five percent test would apply to the numerical data entered in fields (b) through (f) of Form SR. The textual data in field (a) of Form SR, “Class of Shares,” would not be subject to this test. *See id.* at 102. For field (a), the Commission should require that any errors be corrected through an amended Form SR.

²⁵ *See* 17 C.F.R. § 240.13d-1(a) (requiring the filing of a Schedule 13D or 13G whenever any person acquires more than 5% of a class of an issuer’s equity securities). Also, this general five percent threshold for assessing materiality in the beneficial ownership context is a more appropriate analogy to the Proposal than the lower one percent rubric for changes in beneficial ownership set forth in Rule 13d-2(a). *See* 17 C.F.R. § 240.13d-2(a).

and by the SEC staff with respect to assessing quantitative materiality in SAB 99.²⁶ For Form SR reporting, we believe a single simple market-wide standard set by the SEC is appropriate.

D. Response to Question 11: There Is No Need for a De Minimis Exception to the Form SR Reporting Obligation.²⁷

The Proposal does not contemplate a *de minimis* exception to the Form SR reporting obligation. Issuers would be required to report all share repurchases, regardless of how small they may be. We agree with this approach.

If the Proposal is adopted, the compilation and reporting of Forms SR will likely become routinized and highly automated. Issuers will institute policies and procedures (likely building upon their existing processes for complying with Item 703) to effectuate daily Form SR reporting. But once these systems are in place, the actual ongoing compliance burdens of compiling and submitting Forms SR should be negligible (and we anticipate much of this work will be outsourced to broker-dealers). For issuers, submitting Form SR reports will become mundane.²⁸ There is no demonstrated need in the Proposal for a *de minimis* exception (nor is a principles-based rationale posited for why such an exception might be warranted), and we similarly can envision none. The only downside of not having a *de minimis* exception is that over-reporting will result, as issuers necessarily report small, clearly immaterial share repurchases. But investors who are savvy enough to make use of Form SR data will be able to accommodate the submission of such *de minimis* reports.

E. Response to Question 22: Item 703 Disclosures Should Conform to New Form SR and the Additional Disclosures Contemplated for Item 703 Regarding Share Repurchase Objectives and Issuer Policies and Procedures Are Warranted.²⁹

²⁶ See Staff Accounting Bulletin 99: Materiality, SEC Rel. No. SAB 99 (Aug. 12, 1999) (stating the staff had no objection to the use of a five percent error test as a “rule of thumb” in assessing quantitative materiality but noting that any such threshold “is only the beginning of an analysis of materiality”) available at <https://www.sec.gov/interps/account/sab99.htm>.

²⁷ Proposal at 21, Question 11 (“Should we provide a *de minimis* exception to the Form SR reporting requirement for share repurchases that are below a certain level? . . . If so, what level would be appropriate and why?”).

²⁸ Indeed, we anticipate many issuers would voluntarily choose not to apply a *de minimis* exception even if this were permitted, preferring the simplicity of a universal Form SR reporting system over a system that incorporated the additional complexities necessary to identify and forestall the furnishing of *de minimis* reports.

²⁹ *Id.* at 27, Question 22 (“. . . In addition, Item 703 would continue to require monthly summary disclosure of share repurchases that would be similar to, but not the same as, Form SR tabular disclosure. What are the costs and benefits of providing this disclosure as proposed? Do these different sets of share repurchase disclosures provide

In addition to setting standards for new Form SR, the Proposal also would make certain amendments to Item 703.³⁰ Item 703 disclosures would continue to be required every quarter,³¹ but the scope of these disclosures would change. In particular, Item 703 would be aligned with new Form SR to require disclosure of the total number of shares repurchased in a quarter in reliance on the Rule 10b-18 safe harbor or pursuant to a Rule 10b5-1 plan.³² In addition, Item 703 would include new disclosures about the objective or rationale for share repurchase plans, the process or criteria used by the issuer to calculate repurchases, and a description of the issuer's policies and procedures related to officer or director share repurchases.³³ Finally, the Proposal would require Item 703 data to be submitted in Inline XBRL format, like Form SR.³⁴

These revisions are reasonable and warranted. Aligning the disclosures in Item 703 to those in the proposed Form SR would maintain consistency across these disclosures. Ideally, an issuer's quarterly Item 703 data would simply be a summation of its previously submitted Form SR data. But this may not always hold, given the potential in the Proposal for data errors to be reported on Form SR and never corrected. We encourage the SEC to acknowledge this potentiality and, more importantly, confirm in the Proposal that issuers would not be required to reconcile their quarterly Item 703 disclosures with their preceding quarterly Form SR reports.

Requiring quarterly reconciliations between Item 703 and Form SR would impose an unnecessary burden on issuers. First, the magnitude of any reconciliations should be quite small (particularly if all errors of five percent or more are corrected as we recommend). Requiring a quarterly reconciliation of small numbers would not be material to investors. Second, requiring quarterly reconciliations would undermine issuers' reasonable expectations that Form SR, as a *furnished* but not a *filed* form, will not carry the same potential scope of liability as the issuer's Item 703 reporting. To require quarterly reconciliations between Form SR data and Item 703 data would blur the legal distinction between these two reporting regimes.³⁵

distinctly valuable information for investors and market participants? Should there instead be more alignment between Item 703 and Form SR tabular data? . . .").

³⁰ The proposed amendments would technically apply to Item 703 and related SEC forms (*see id.* at 22 and 28), however for simplicity we focus our discussion solely on Item 703.

³¹ *See id.* at 44-45.

³² *Id.* at 22. These quarterly data must further be broken down by month. *Id.* at 64.

³³ *Id.* at 22.

³⁴ *Id.* at 29.

³⁵ For this reason, the Commission should not require issuers to reconcile their Item 703 report to their preceding Forms SR *even if* the Commission adopts our recommendation to trigger Form SR reporting at settlement. After all, if both Form SR and Item 703 were reports of trade settlements, the data should always reconcile completely and requiring a quarterly reconciliation would seem entirely appropriate. But the legal distinction to issuers between furnishing Form SR and filing Item 703 merits treating these sources separately, even if the reported numbers should always be 100% reconcilable.

Vanessa Countryman

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II. Conclusion

For the reasons expressed herein, NASAA supports the Proposal and encourages its adoption with certain revisions discussed above. The Proposal represents a substantial enhancement to the Commission's existing share repurchase disclosure regime and would benefit investors at minimal cost to securities issuers. If you have any questions or would like additional information, please do not hesitate to contact the undersigned or NASAA's General Counsel, Vince Martinez, at (202) 737-0900.

Sincerely,

A handwritten signature in black ink that reads "Melanie Senter Lubin". The signature is written in a cursive style with a loop at the end of the last name.

Melanie Senter Lubin
NASAA President
Maryland Securities Commissioner